

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CHERYL KATER and SUZIE KELLY,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

CHURCHILL DOWNS INCORPORATED, a
Kentucky corporation, and BIG FISH
GAMES, INC., a Washington corporation,

Defendants.

Case No.: 2: 15-cv-00612-RBL

**DECLARATION OF LINDSEY
BARNHART IN SUPPORT OF
DEFENDANTS' MOTION FOR
RULE 23(d) PROTECTIVE ORDER**

MANASA THIMMEGOWDA, individually
and on behalf of all others similarly situated,

Plaintiff,

v.

BIG FISH GAMES, INC., a Washington
corporation; ARISTOCRAT
TECHNOLOGIES INC., a Nevada
corporation; ARISTOCRAT LEISURE
LIMITED, an Australian corporation; and
CHURCHILL DOWNS INCORPORATED, a
Kentucky corporation,

Defendants.

Case No.: 2:19-cv-00199-RBL

**DECLARATION OF LINDSEY
BARNHART IN SUPPORT OF
DEFENDANTS' MOTION FOR
RULE 23(d) PROTECTIVE ORDER**

1 I, Lindsey Barnhart, hereby declare as follows:

2 1. I am an attorney at the law firm of Covington & Burling LLP. I am one of
3 the attorneys representing Defendants Big Fish Games, Inc., Aristocrat Technologies, Inc., and
4 Aristocrat Leisure Limited in the above-captioned actions. I make this declaration based on my
5 personal knowledge and, if called as a witness, I could and would competently testify thereto.

6 2. On January 22, 2020, I navigated to Edelson P.C.'s Opt-Out Website at
7 the web address www.nocasinoarbitration.com. See *Kater* Dkt. 159. Attached hereto as **Exhibit**
8 **A** is a true and correct copy of a screenshot I took of the Opt-Out Website.

9 3. On January 23, 2020, I emailed Plaintiffs' counsel to schedule a meet-and-
10 confer call regarding content on the Opt-Out Website that Defendants believe to be misleading.
11 Alex Tievsky, one of Plaintiffs' attorneys, responded that "[t]his is not an emergency," and
12 stated that his firm was not available to meet and confer until the following week. At Mr.
13 Tievsky's request, I responded by email on January 24, 2020 with numerous examples of
14 statements on the Opt-Out Website that Defendants believe to be misleading. A true and correct
15 copy of these emails is attached hereto as **Exhibit B**.

16 4. On January 27, 2020, my colleague Ashley Simonsen and I met and
17 conferred with Todd Logan and Cecily Shiel, two of Plaintiffs' attorneys, by phone.

18 5. During the January 27 phone call, Mr. Logan confirmed that his law firm,
19 Edelson P.C., has purchased Google and Facebook advertisements targeting putative class
20 members in this litigation and directing them to the Opt-Out Website. Attached hereto as
21 **Exhibit C** is a true and correct copy of what I understand to be the Facebook advertisement
22 purchased by Edelson. Attached hereto as **Exhibit D** is a true and correct copy of the Google
23 advertisement purchased by Edelson, which I located by searching on Google for "Big Fish
24 Casino."

25 6. During the January 27 phone call, I asked Mr. Logan why Edelson had
26 disclosed to the Court only the Opt-Out Website, and not the Facebook and Google
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1 advertisements. Mr. Logan stated his belief that the advertisements are not communications
2 subject to disclosure.

3 7. During the January 27 phone call, counsel discussed the example website
4 statements I had previously identified by email. Mr. Logan stated his belief that none of the
5 statements are misleading and indicated that Edelson would not remove the statements or take
6 down the Opt-Out Website.

7 8. With respect to the Opt-Out Website's statement that this lawsuit might
8 entitle players of the game "Jackpot Magic Slots" to relief, Mr. Logan took the position that the
9 reference to "other similar Big Fish Games 'casino games'" in the alleged class definitions
10 necessarily includes Jackpot Magic Slots.

11 9. With respect to the Opt-Out Website's statement that "it is not clear when
12 [Defendants] think the thirty-day [opt-out] clock starts running," Mr. Logan acknowledged that
13 the Terms of Use state that the thirty days begins as of the date of "acceptance of these Terms of
14 Use." However, Mr. Logan took the position that the date of "acceptance" is unclear because
15 determining when a user accepts the Terms of Use is a fact-intensive, individualized inquiry. In
16 subsequent email correspondence, Mr. Logan purported to disavow the position he took during
17 the call. A true and correct copy of emails exchanged between the parties following the meet-
18 and-confer call is attached hereto as **Exhibit E**.

19 10. With respect to the Opt-Out Website's statement that putative class
20 members may "recover *all* of the money" they have spent, I asked Mr. Logan whether Edelson
21 intends to seek an award of attorneys' fees from any class recovery in this litigation. Mr. Logan
22 did not disclaim any such intent.

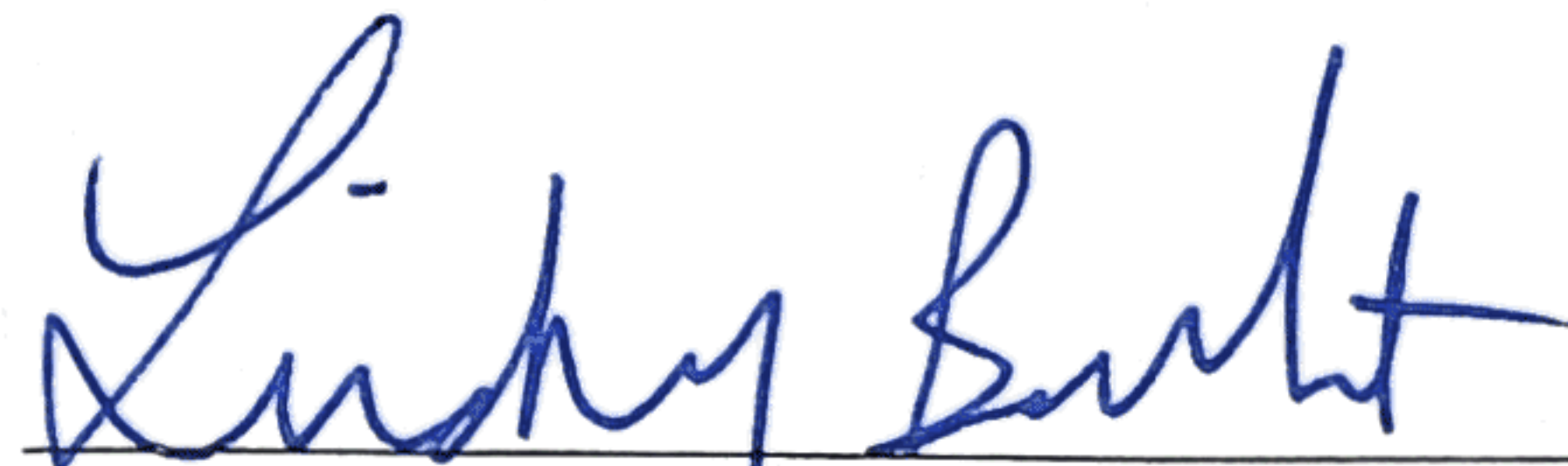
23 11. Attached hereto as **Exhibit F** is a true and correct copy of in-game
24 communications in which a Big Fish Casino user encouraged other users to visit Edelson's Opt-
25 Out Website. Edelson previously identified this user as its client. *See Kater* Dkt. 140. During
26 the parties' meet and confer, Edelson declined to state whether its lawyers have directed or urged
27 their clients to send communications such as these, claiming that such information is protected
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1 by the attorney-client privilege. Because Edelson requested that this user's identifying
2 information not be disclosed in public filings, such information has been redacted from the
3 exhibit attached hereto.

4 12. I understand that at least two users have reported receiving calls from
5 attorneys regarding Big Fish Casino and/or Jackpot Magic Slots. One user reported that the
6 attorney who called her was from Edelson, that the attorney made comments disparaging of the
7 games, and that the attorney referred to a class action lawsuit.

8 13. At 4:43 p.m. PT on January 21, 2020, Mr. Tievsky, one of Plaintiffs'
9 attorneys, notified Defendants' counsel by email that the in-game pop-up Big Fish Games was
10 then displaying to users included the phone number for Mr. Logan, another one of Plaintiffs'
11 attorneys, instead of the 1-800 number for the Edelson law firm. After confirming that Mr.
12 Logan's phone number had been inadvertently displayed for less than 90 minutes due to a
13 technical error, I responded to Mr. Tievsky at 5:18 p.m. PT to confirm that the error had been
14 corrected. Attached hereto as **Exhibit G** is a true and correct copy of the emails exchanged
15 regarding this issue.

16 I declare under the penalty of perjury under the laws of the United States that the
17 foregoing is true and correct. This declaration is executed this 30th day of January, 2020,
18 in Palo Alto, California.

19 
20 Lindsey Barnhart